

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9178

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

DISTRICT OF COLUMBIA

405

FRED BUFORD,

Appellant,

VS.

JANET P. BUFORD,

Appellee.

*United States Court of Appeals
for the District of Columbia*

FILED FEB 13 1946

Joseph W. Stewart

CLERK

**Appeal from the District Court of the United States for the
District of Columbia**

HALLOCK P. LONG,

DANIEL L. GRANTHAM,

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United States Court of Appeals

DISTRICT OF COLUMBIA

NO. 9178

FRED BUFORD,

Appellant,

vs.

JANET P. BUFORD,

Appellee.

Appeal from the District Court of the United States
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The suit in the District Court was filed by virtue of Sec. 11-306, D. C. Code, 1940, and appeal to this court is taken under authority of Sec. 17-101, supra. The Plaintiff (appellant) was a bona fide resident of the District of Columbia for more than one year prior to filing a suit for absolute divorce for a cause arising in the said District.

STATEMENT OF THE CASE

The parties were married in 1935 and separated in 1939. (Tr. 4, 5.) Less than two months after the separation the wife filed a suit for limited divorce or separate maintenance. After trial the Court denied the divorce but granted

separate maintenance. In 1941 the husband sued for an absolute divorce on the ground of desertion, and after trial, the Court entered a judgment denying the divorce and terminating the allowance for maintenance. (Findings of Fact 2, 3— Appellant's App. 8) In 1944 the present suit was filed by the husband, asking for an absolute divorce on the ground of voluntary separation for five consecutive years. The wife answered admitting the parties had not lived together since February 15, 1939, but denying that the separation was voluntary. (Complaint and Answer, App. 2-5)

At the trial appellant (plaintiff below) testified that appellee had voluntarily left his home February 15, 1939, and the parties had not since cohabitated as man and wife. (Tr. 5) A witness testified that he had lived at plaintiff's home for the past ten years, and that the defendant had been gone for four or five years. He could not say exactly when she left, but it was around 1939. (Tr. 17, 18.)

On cross-examination plaintiff admitted that in 1943 he had gone through a marriage ceremony with another, but there was no showing that he was living with or had ever lived with this other. (Tr. 8,9.)

At the close of the plaintiff's case, defendant moved to dismiss on the ground that no witness had corroborated the plaintiff on the exact year defendant left. The Court granted this motion, but gave as its reason, that plaintiff by his marriage to another in 1943 had put it beyond his power to say that his separation from the defendant was voluntary. (Transcript— App. 6)

STATUTE INVOLVED

The District of Columbia Code, 1940, Section 16-403; Amended Aug. 7, 1935, 49 Stat. 539, ch. 453, par 1, provides:

“A divorce from the bond of marriage * * * may be granted for * * * voluntary separation from bed and board for five consecutive years without cohabitation, * * * .”

STATEMENT OF POINTS

1. The testimony adduced in behalf of the plaintiff made out a case entitling him to an absolute divorce; and defendant's motion to dismiss the complaint should have been overruled.
2. It is not necessary to prove that a separation was originally voluntary; it is sufficient to show that the parties have voluntarily lived separate and apart from bed and board without cohabitation for five consecutive years to entitle the plaintiff to an absolute divorce.
3. The defendant when she filed a suit for divorce in March, 1939, established of record the time from which the separation had been voluntary on her part.
4. The plaintiff by going through a marriage ceremony with another did not put it beyond his power to say whether his separation from the defendant was voluntary or not.
5. The following should not have been admitted in evidence—
 - a. Testimony on defenses not put in issue by the answer;
 - b. Testimony relating to plaintiff's purported marriage to another;
 - c. Testimony on issues adjudicated in prior litigation between the parties;
 - d. Testimony on cause of original separation; and
 - e. Cross-examination on matters not touched on in the direct examination.

SUMMARY OF ARGUMENT

Appellant contends that he made out a case for absolute divorce, and his complaint should not have been dismissed. That he is only required to show that the parties voluntarily lived apart for five years without cohabitation, and it is irrelevant and immaterial whether the original separation was voluntary or not. That appellee by filing suit for divorce on March 23, 1939, established of record that from that date at least the separation was voluntary on her part. That the subsequent marriage ceremony between appellant and another did not preclude him from showing that his separation from appellee had been voluntary for five consecutive years.

The objections to the admission of evidence will not be separately treated, as they sufficiently appear from the Statement of Points and this Summary.

ARGUMENT

The period during which the parties have been living apart is not put in issue by the pleadings, as both the complaint and answer agree that they have not lived together since February 15, 1939. The plaintiff testified that defendant had left him voluntarily on that date, and a corroborating witness, who had lived at his home for the past ten years, said she had been gone four or five years, although he could not say exactly when she left. However, the year of the separation is fixed by the docket entry in Civil Action 2141, showing appellee filed her suit for divorce on March 23, 1939. The case at bar is the third time the domestic affairs of the parties have been litigated in the lower court, and in all three of them the appellee, (the wife) stated the parties have been living apart since February, 1939. (See paragraph six of her complaint in

C. A. 2141, filed Mar. 23, 1939, App. 7). Section 16-419 of the D. C. Code, 1940, provides that admissions of a defendant standing alone will not be taken as proof, but it does not follow that a formal statement under oath cannot be considered with other corroborating evidence to establish a date or fact.

It makes no difference how the separation originally occurred, if the parties voluntarily and continuously acquiesce in living apart for five years as held by the Court of Appeals in several recent cases. In the case of *Bowers vs. Bowers*, 79 U. S. App. D. C. 146; 143 F. 2d 158, the court said—

“ * * * We have held that if both parties voluntarily and continuously acquiesce in separation during five years, the statute authorizes divorce even though the separation was not originally voluntary on both sides. *Parks vs. Parks*, 73 App. D. C. 93; 116 F 2d 556 * * * one who contends that a voluntary separation ceased to be voluntary should have the burden of proving his contention.”

In the *Parks* case cited, the wife had obtained a limited divorce for the husband's desertion, and thereafter he sued for an absolute divorce on the ground of five years voluntary separation. In reversing the lower court, the Court of Appeals held he was entitled to his divorce, saying—

“ * * * The separation was not at first voluntary on the defendant's part; when the plaintiff deserted her, she begged him not to go. But from that time on she neither asked him to return nor made any other attempt to bring about a reconciliation. * * * The liberal purpose of the 1935 amendment * * * was to permit termination in law of certain marriages which have ceased to exist in fact. This is such a marriage. We think the defendant's silent acquiescence made the separation voluntary, in the statutory sense, within less than a year after it began, and therefore more than five years before the plaintiff filed this suit. It follows that he is entitled to a divorce.

The fact that the separation resulted from the husband's fault is no defense, since the statute does not require that the separation originate in any particular way. It requires only that for five consecutive years the separation be voluntary. * * * "

Parks vs. Parks, 73 App. D. C. 93; 116 Fed. 2d 556.

For the purpose of the motion to dismiss, all of the plaintiff's evidence is taken as true, and his proof being sufficient to entitle him to an absolute divorce, the motion should have been overruled.

The fact that plaintiff had gone through a marriage ceremony with another subsequent to his separation from the defendant does not prevent him from showing that his separation from the defendant had been voluntary for five consecutive years, and this would be true even if it was proved that he was living in adultery with this other, or was guilty of any other conduct that would entitle the defendant to a divorce in her own right. In the recent case of *Vanderhuff vs. Vanderhuff*, 79 U. S. App. D. C. 153; 144 F 2d 509, the Court of Appeals said—

"We believe our present statute has changed the policy which made recrimination an absolute bar to divorce. * * * We have already held that recrimination is not a defense in the case of voluntary separation from bed and board for five years. (Citing *Parks vs. Parks*, *supra*.) * * * "

and continues it would be no defense to show that a defendant had been guilty of adultery, desertion, or convicted of a felony, etc. In the *Vanderhuff* case, *supra*, the wife was granted a divorce on the ground of the husband's conviction of a felony, notwithstanding a charge against her of adultery. In the case at bar there was no evidence that the husband had been guilty of adultery, aside from his admission that he had gone through a marriage ceremony with another.

It is submitted that the trial court should be reversed,
and this case sent back for a new trial.

HALLOCK P. LONG,

DANIEL L. GRANTHAM,

Attorneys for Appellant.

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United States Court of Appeals

DISTRICT OF COLUMBIA

NO. 9178

FRED BUFORD

Appellant,

VS.

JANET BUFORD

Appellee.

Appeal from the District Court of the United States
for the District of Columbia

JOINT APPENDIX

IN THE
1 DISTRICT COURT OF THE UNITED STATES

FOR THE
DISTRICT OF COLUMBIA

FRED BUFORD, *Plaintiff*,
1434 Q St., N. W.,

vs.

JANET P. BUFORD, *Defendant*,
1862 California St., N. W.

Civil Action No. 25708

Filed Aug. 26, 1944 Charles E. Stewart, Clerk

Petition for Absolute Divorce

(Voluntary Separation)

1. Jurisdiction is invoked by virtue of Section 11-306, of the Code of Laws for the District of Columbia, 1940. Both parties are citizens of the United States and have been bona residents of the District of Columbia for more than one year prior to the filing of this petition.

2. The parties were married August 8, 1935, in the District of Columbia, and no children have been born of the union. There are no property rights to be adjudicated.

3. The parties voluntarily separated February 15, 1939, in the District of Columbia, and since that have lived separate and apart without cohabitation, a period of more than five consecutive years prior to the filing of this action.

4. That at the time of the said separation the parties were living at 1434 Q Street, Northwest, and the plaintiff has continued to live at that address until the filing hereof. That on, to-wit, February 15, 1939, the defendant removed to 1862 California Street, Northwest, where she has continued to reside until the date hereof.

Wherefore plaintiff prays judgment—

1. That he be granted a divorce, *a vinculo matrimonii*, on the ground of voluntary separation from bed and board for five consecutive years without cohabitation.

II. And for such other, further and more general relief as the exigencies of the case may require.

FRED BUFORD

Plaintiff.

2 District of Columbia, ss:

Fred Buford, being first duly sworn upon his oath deposes and says that he has read the foregoing petition by him subscribed, and that the facts therein stated of his own knowledge are true, and the facts stated on information and belief, he believes to be true.

FRED BUFORD

Subscribed and sworn to before me, this 25th day of August, 1944.

D. L. GRANTHAM
Notary Public, D. C.

(S E A L)

H. P. LONG, *Attorney for Plaintiff*,
400 5th St., N. W., ME 0516.

Answer to Complaint for Absolute Divorce

3

(Voluntary Separation)

Now comes the defendant, Janet P. Buford in the above entitled cause and in answer to the plaintiff's complaint, states as follows:

1. The defendant admits the allegations in paragraph 1 of the complaint.

2. The defendant admits the allegation in paragraph 2 in that the parties hereto were married August 4, 1935, and no children were born of this marriage; the defendant denies that there are no property rights to be adjudicated.

3. The defendant denies that the plaintiff and defendant voluntarily separated from bed and board, or from each other either on February 15, 1939, or at any time whatsoever. Defendant says that the separation which occurred on or about February 15, 1939, was not voluntary on the part of either of said parties but was caused and brought about and resulted from extreme cruelty on the part of the plaintiff toward defendant. That as a result of the cruelty administered by the plaintiff to defendant the latter was forced to separate from the defendant and to set up her own abode separate and apart from plaintiff. Defendant admits that the parties have not cohabited together and have lived separate and apart from each other since February 15, 1939.

4. Further answering the complaint, defendant says that all during their married life, plaintiff has been practicing his profession as Doctor of Chiropody, in the City of Washington, D. C., and in addition thereto is receiving a certain sum of money from the United States Government each month as a retirement payment from the Government all in the total of approximately \$300.00 per month, in addition to the rental of rooms for \$100.00 per month.

Defendant is employed in a private home and receives a salary of \$120.00 per month and is solely dependent on her salary for her own support and the support of her minor child by a former marriage, is partly paid by defendant.

WHEREFORE, defendant prays:

1. That the complaint be dismissed with allowance of all proper costs to defendant including counsel fees.
2. That permanent alimony be allowed the defendant.
3. For such other and further relief as the Court may deem just and proper.

JANET P. BUFORD

DISTRICT OF COLUMBIA:

Janet P. Buford, being first duly sworn on oath deposes and says that she has read the foregoing answer by her subscribed and knows the contents thereof; that the facts therein stated as of personal knowledge are true and those stated upon information and belief she verily believes to be true.

JANET P. BUFORD

Subscribed and sworn to before me this 6th day of November, 1944.

THERESE M. TANGORA
Notary Public, D. C.
 My Commission Expires
 January 14, 1946.

Copy of foregoing mailed to
 H. P. Long, Esq., Atty. for Plaintiff
 this 14th day of November, 1944.

THOMAS A. FARRELL,
Attorney for Defendant
 500 Southern Building,
 Washington, D. C.

* * * * *

MR. LONG: That is our case.

28 MR. FARRELL: Your Honor, I ask that the complaint be dismissed at this time, because he hasn't proven his case. There is no witness who has testified as to the exact date she left, or whether it was 1939, 1940, or what it was.

THE COURT: I think the motion must be granted, because by his marriage in Maryland, he put it beyond the power of the parties to say whether it was voluntary or not.

29 MR. LONG: If Your Honor, please, first as to that marriage in Maryland: that was made under a mistake of law, of course, and there is now a proceeding in the Court of Appeals pending, to annul that.

THE COURT: There isn't anything in the record to indicate that.

MR. LONG: I think, aside from that, if Your Honor feels that that action with this woman, in a sense, puts him in a position where he is not coming in Court with clean hands,—if that is the view Your Honor takes,—I think we have a case in the Court of Appeals on that question, that in these cases of five years' separation, here these people have been in court four times, now; three times here, once in Mexico. It is clear that they never intend to live together—

THE COURT: There is nothing in the record about a Mexican decree.

MR. LONG: I don't think it is necessary for my argument; but it is clear that they are not living together, have not lived together for five years, and they will not live together.

I think, under the Court of Appeals case—

THE COURT: He hasn't even said that he is not living with the woman that he married in Maryland.

MR. LONG: May I recall him to the stand? I thought that point was covered.

MR. FARRELL: I think Your Honor ruled on the motion; and in addition to that, I move that plaintiff pay counsel fees in this matter.

30 MR. LONG: Might I cite this case that I have in mind, Your Honor? I would like to cite it before Your Honor finally rules on the motion.

THE COURT: No, I don't think so.

MR. LONG: I understand that Your Honor will deny the divorce,—the relief prayed?

THE COURT: I shall dismiss the complaint; and (addressing Mr. Farrell), I shall deny your request for counsel fees.

32 Plf #2—Civil Action No. 25708

FILED MAR 23 1939 CHARLES E. STEWART, Clerk

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Holding an Equity Court

JANET BUFORD
1862 California St., N. W.,
Washington, D. C.

Plaintiff,

vs.

DR. FRED BUFORD,
1434 Que Street, N. W.,
Washington, D. C.,

Defendant.

Civil Action File 2141

COMPLAINT

(FOR LIMITED DIVORCE AND SEPARATE MAINTENANCE ON THE GROUNDS OF CRUELTY)

* * * * *

6. That the plaintiff, in order to protect herself and children was obliged to establish a separate residence from the defendant.

* * * * *

JANET P. BUFORD. (s)

* * * * *

5 *Findings Of Fact And Conclusions Of Law*

This cause came on to be heard in open court and upon consideration of the defendant's oral motion to dismiss the complaint made at the close of the plaintiff's case, the Court finds this 13th day of November, 1945, that the testimony adduced on behalf of the plaintiff established:

1. That the plaintiff, Fred Buford, and the defendant, Janet Buford, were married to each other on August 8, 1935,

2. That the defendant herein, on March 23, 1939, filed Civil Action No. 2141 praying for a limited divorce on the grounds of cruelty, which after hearing was denied, and the prayer of the said defendant herein for maintenance, was granted.

3. That the plaintiff herein, on May 12, 1941, filed Civil Action No. 11357 praying for an absolute divorce on the ground of desertion, which after hearing was denied and defendant's prayer for maintenance denied.

4. That the plaintiff has been a bona fide resident of the District of Columbia since 1922.

5. That the plaintiff on October 1, 1943, obtained a marriage license and on said date married one Elsie J. Clark at Bel Air, Maryland, and there is no showing that the plaintiff is not living with the said Elsie J. Clark at the present time.

6. That the cause for absolute divorce on the grounds of voluntary separation for five (5) consecutive years without cohabitation as alleged by the plaintiff in the complaint, has not been proven, it not appearing that the separation was voluntary.

6 7. That the plaintiff by his marriage in Maryland has put it beyond the power of the parties to say whether the separation was voluntary or not.

8. That the oral motion made by the defendant to dismiss the plaintiff's complaint, is granted.

W. Dickinson Letts
Justice.

Seen:
H. P. Long.

* * * * *

7

Order

This cause came on to be heard in open court upon the complaint of the plaintiff and the answer of the defendant and testimony having been adduced on behalf of the plaintiff in the presence of counsel representing each party to the cause and upon consideration of defendant's oral motion to dismiss at the close of the plaintiff's case, it is by the Court this 13th. day of November, 1945,

ADJUDGED, ORDERED, and DECREED as follows:

1. That the plaintiff's complaint for an absolute divorce on the grounds of voluntary separation for five (5) con-

secutive years without cohabitation, be and the same is hereby dismissed.

2. That the defendant's prayer for counsel fee is hereby denied.

F. Dickinson Letts

Justice

Seen

H. P. Long

BRIEF ON BEHALF OF APPELLEE

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9178

*United States Court of Appeals
for the District of Columbia*

FILED MAR 25 1946

FRED BUFORD, *Appellant*,

v.

JANET P. BUFORD, *Appellee*.

Joseph W. Stewart
CLERK

Appeal from the District Court of the United States for the
District of Columbia.

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9178.

FRED BUFORD, *Appellant*,

v.

JANET P. BUFORD, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF ON BEHALF OF APPELLEE.

STATUTE INVOLVED.

District of Columbia Code, 1940, Title 16-419. Proof
required.

* * * *

“Nor shall any admission contained in the answer of
the defendant be taken as proof of the facts charged
as the ground of the application, but the same shall in
all cases, be proved by other evidence.”

STATEMENT OF THE CASE.

This case comes before this Court on appeal by Fred Buford from a judgment of the lower court denying an absolute divorce.

The parties herein were married in 1935. The plaintiff in 1941, filed suit for an absolute divorce on the grounds of voluntary separation for five consecutive years without cohabitation. The defendant denied that the separation was voluntary. The plaintiff testified that the defendant had left his home February 15, 1939 and since that time the parties had not lived together as man and wife [T. p. 5].

The plaintiff further testified that he married Elsie Josephine Clark at Bel Air, Maryland [T. p. 8], although he was married to the defendant.

A witness was called on behalf of the plaintiff and testified that he could not say exactly when Mrs. Buford left the plaintiff.

At the close of the plaintiff's case, defendant moved to dismiss on the ground that no witness had corroborated the plaintiff as to the exact year the defendant left. The Court granted this motion, but gave as its reason, that the plaintiff by his marriage to another in 1943, had put it beyond his power to say that his separation from the defendant was voluntary.

SUMMARY OF ARGUMENT.

The Statute requires five full years of voluntary separation before a divorce can be granted to parties utilizing this ground. Here, the voluntary separation did not exist for the statutory period because the appellant is barred from asserting that the separation indeed was voluntary for the statutory period. The appellant's marriage was an effective impediment to any such assertion. Likewise, the appellant has failed to offer appropriate corroborative evidence as to whether or not the five-year separation period has elapsed.

Point I.

The appellant by his marriage to another in 1943, has conclusively placed it beyond his power to say that the separation was mutually voluntary for the full five-year period.

The pertinent statute provides that a divorce from the bonds of matrimony may be granted among other grounds for a voluntary separation from bed and board for a period of five years without cohabitation.

It is obvious that the public policy of the 1935 amendment to the District of Columbia Code (D. C. Supp. 5, Title 14, Section 13) was based upon a proposition that once a husband and wife have lived apart for a period of five years voluntarily without any intention of resuming the conjugal relationship, the interest of society will be served by dissolving the marital relationship. This establishes a new ground for divorce and this ground may exist apart from any offense against the marital status itself.

Vanderhuff v. Vanderhuff, 79 App. D. C. 153; 144 F. (2d) 509.

While this court has held that the initial separation need not be voluntary, nevertheless five years of voluntary separation must have elapsed before a divorce on this ground may be granted. *Parks v. Parks*, 73 App. D. C. 93; 116 F. (2d) 556.

The facts here show that there has been no compliance with the five years voluntary separation requirements and that therefore the lower Federal District Court was correct in granting a dismissal. The Statute requires that the parties must have been voluntarily separated for five years. It is obvious that there must be mutuality as to separation. Otherwise, if but one of the parties separated without the same intention on the part of the other spouse, a question of desertion instead of voluntary separation would arise. Thus, in the State of Wisconsin, the Court there has held

under a similar statute that to constitute a voluntary separation it must appear that the separation was mutually voluntary in its inception and so continue throughout the statutory period. *Sanders v. Sanders*, 135 Wis. 613; 116 N. W. 176.

This rule is not in conflict with *Parks v. Parks*, *supra*, because this Court in the latter case there pointed out that the statutory period did not begin to run immediately after the initial separation. See also *Thompson v. Thompson*, 13 Wis. 153; 10 N. W. 166.

Throughout the various jurisdictions the statutory period for divorce on the basis of voluntary separation varies from one to two years up to ten years. The statutory purpose of requiring any such period to elapse before a divorce may be granted on this ground is to grant both the husband and wife an appropriate time within which to change their minds regarding a resumption of the marital status, should a change of mind occur before the expiration of a period and it is properly manifested a divorce cannot be granted because of non-compliance with a statute. Otherwise, the husband and wife could mutually agree to separate and the proper basis for divorce could be established immediately without any substantial expiration of time whatsoever. But it is clear that the full five years must elapse, throughout which time the parties must be voluntarily separated; and unless there has been a full five years elapse (up to and including the last second) during which time the parties have continuously manifested a desire to be separated voluntarily, there can be no proper basis for a divorce.

So, as a corollary to the above proposition when either husband or wife indicates a desire to resume the marital relationship the claim of voluntary separation thereafter cannot be asserted. *Wilson v. Wilson*, 122 Wis. 27; 99 N. W. 431.

If a wife, therefore, should within five years request that marital relations be resumed this would preclude a divorce by the husband under the five year separation statute, the

reason being that after the request by the wife for a resumption of marital relations the living apart is no longer voluntary on her part and the case does not fall within the requirements of the statute. *Kraus v. Kraus*, 179 Wis. 165; 187 N. W. 1019.

So, when a husband marries another during the five-year period, he effectively precludes and forecloses the right of the wife to change her mind as to a resumption of marital relations. The wife in such a situation cannot be said to be voluntarily separated if she has no other course to pursue. The separation is thus not mutual. She is no longer free to exercise a choice, and thus being placed in a position which prohibits her from announcing her intention to resume marital relations with her husband the separation is not voluntary and there is no compliance with the statute. Announcement by the appellee of her intention to resume relations with her husband, the appellant, would not only have been stultifying but obviously useless.

In another Wisconsin case the wife was compelled to leave the husband because of cruel treatment and no effort by the latter was made to effect a reconciliation. Further, there is nothing to indicate that the wife had consented to a separation. The Court held that the separation was not voluntary, in order to enable a divorce to be granted under that State's separation statute. *Jakubke v. Jakubke*, 125 Wis. 635; 104 N. W. 704.

The exact question presented here has not been the subject of a decision in the local Federal Courts, but the cases cited above are both pertinent and persuasive as the statute in the State of Wisconsin is somewhat similar to the local statute. Cases such as *Bowers v. Bowers*, 79 U. S. App. D. C. 146; 143 Fed. 2d. 158; *Parks v. Parks*, *supra*; *Vanderhuff v. Vanderhuff*, *supra*, are not in point and are concerned solely with the question of a manner in which the statutory period began to run; the question of recrimination and other points not being involved here. In this particular matter, there is no question of recrimination, the

pertinent question being solely as to whether or not the full five-year period of voluntary separation has elapsed. It is submitted, in view of the above contentions, that the lower Federal Court was correct in granting the motion to dismiss.

Point 2.

The appellant has failed to offer the required corroborative evidence as to whether the five-year voluntary separation period has elapsed. In order to obtain a decree of divorce on the grounds of voluntary separation for five consecutive years without cohabitation, there must be corroborating testimony by the party who contends that the husband and wife were separated for five years. Here the appellant offered no substantial testimony that the parties hereto were separated for five years. While there is some testimony that the wife had left home, nevertheless the corroborating witness could give no testimony as to any definite date as to when the separation occurred. The District Code, Title 16, Section 419 provides as follows:

“No decree for a divorce, or decree annulling a marriage, shall be rendered on default, without proof; nor shall any admission contained in the answer of the defendant be taken as proof of the facts charged as the ground of the application, but the same shall in all cases, be proved by other evidence.”

The United States Court of Appeals for the District of Columbia has held that parties to a suit in divorce cases are not competent to testify as witnessed in their own behalf. See *Bergheimer v. Bergheimer*, 17 App. D. C. 381; *Lenoir v. Lenoir*, 24 App. D. C. 160; *Burdette v. Burdette*, 2 Mackey 469. These cases support the proposition that no decree for a divorce can be granted upon the mere unsupported petition and testimony of either husband or wife, notwithstanding that a sworn petition has been filed. The plain purpose of the law is to prohibit divorce upon the mere statement of one of the parties without corroborative

evidence. See also *Marshall v. Marshall*, 55 App. D. C. 173.

The corroborating witness here testified that the wife had been gone four or five years. This amounts to no corroborative evidence whatsoever. Since the Statute requires five years of voluntary separation, corroborative evidence as to a lesser period would obviously be insufficient. To approve as corroborative evidence testimony as to "four or five years" when five years is required, would open the door to the same evil which the statute is designed to prohibit. Thus in this additional ground also it is submitted that the Federal Court below could have properly based its decision to dismiss the petition.

CONCLUSION.

As shown above, the five-year period, if it ever actually existed, was not on a voluntary basis and therefore the pertinent statute has not been complied with. Should there be any doubt whatsoever as to the voluntary character of the five-year separation, it is submitted, however, that the motion was properly granted because of the failure of the appellant to properly support the adduced testimony by appropriate corroborative evidence. It is submitted, therefore, that the Court should confirm the District Court with dismissal of the petition.

Respectfully submitted,

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